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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1658

C & M PETROLEUM PRODUCERS, INC.; HERMAN MORRIS; DAVE MADRAY; AND HERSHELL COLLINS,
Petitioners,

vs.

JOHN C. MEYERS and LUCY B. MEYERS; JOHNNY DEAL; BILLY G. TILLMAN; H. LEHMAN FRANKLIN, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

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C & M PETROLEUM PRODUCERS, INC.; HERMAN MORRIS; DAVE MADRAY; AND HERSHELL COLLINS,

Petitioners,

vs.

JOHN C. MEYERS and LUCY B. MEYERS; JOHNNY DEAL; BILLY G. TILLMAN; H. LEHMAN FRANKLIN, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C & M Petroleum Producers, Inc., Herman Morris, Dave Madray and Hershell Collins, hereinafter collectively referred to as "Petitioners", respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 10, 1973.

OPINIONS BELOW

No opinions of the United States District Court of the Southern District of Georgia, in this case, were reported either officially or unofficially.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been officially reported. An unofficial report of the opinion appears at CCH, *Federal Securities Law Reports*, ¶93,941 (No. 476, April 25, 1973).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 10, 1973.

On April 23, 1973, Petitioners filed a petition for rehearing in the Court of Appeals for the Fifth Circuit which petition was denied by order of that Court, made and entered on May 24, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Respondents, as Plaintiffs below, commenced this case against Petitioners to recover under §12(1) of the Securities Act of 1933, 15 U.S.C. §77l. Petitioners assert the defense that Respondents, subsequent to the controversy but, prior to commencement of the action, waived any rights they may have had under Section 12, Securities Act of 1933. The sole question presented by this case is:

Whether a purchaser of securities sold in violation of Section 5, Securities Act of 1933, may, after the occurrence of the violation and after knowledge of his statutory rights, effectively waive such rights.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, REGULATIONS INVOLVED

This case does not involve any Constitutional provisions, treaties, ordinances, or regulations. The case involves only matters of Federal law arising under the following statutes which are set out verbatim.

Section 5, Securities Act of 1933, 15 U.S.C. §77e:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Section 12(1), Securities Act of 1933, 15 U.S.C. §77l:

Any person who—

(1) offers or sells a security in violation of section 77e of this title . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, Securities Act of 1933, 15 U.S.C. §77n:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

STATEMENT OF THE CASE

On December 24, 1968, Petitioners began offering for sale working interests in oil wells located in Ohio. These interests are "securities" and Petitioners are each a "person who offers or sells a security" within the meaning of the applicable statutes. These interests or securities were offered and sold in violation of Section 5, Securities Act of 1933, 15 U.S.C. §77e, since no registration statement as required by that statute had been filed at the time. No such registration statement has ever been filed. Respondents are purchasers of some of these securities.

Upon being informed of its violation of the law with respect to the offer and sale of these securities, the Petitioner C & M Petroleum Producers, Inc., notified the Respondents of the violation, offered to rescind the sales and to provide the statutory remedy under Section 12(1), Securities Act of 1933, 15 U.S.C. §771.

The controversy between petitioners and respondents came into existence at this point. Petitioners took the position that they had violated the law and incurred civil liability to the respondents and offered respondents the choice of accepting the legal remedy or retaining their investment. On the other hand, respondents said, in effect, "we will keep our investment and rescind our purchase only if we lose money."

Instead of accepting this offer, respondents indicated a desire to retain the securities if they were worth more than they had paid for them by requesting data that would reflect their value, thereby evidencing an unwillingness to accept the remedy provided by Section 12.

Respondents took no further action with regard to these securities until this action was commenced approximately seven months later, and respondents did, after the communications, receive and retain the sum of $1,472.91 in income from the securities.

This case was commenced in the United States District Court for the Southern District of Georgia, which had jurisdiction under Section 22, Securities Act of 1933, 15 U.S.C. §77v. The District Court admitted testimony and correspondence concerning the above facts into evidence over the respondents' objection, and a jury returned the following special verdict:

> Under the evidence and charge of this Court, did the Plaintiffs waive the right to the return of the money they invested in working interests in certain gas wells?
>
> Answer: "Yes" or "No"
>
> This 3rd day of April, 1972.
>
> s/ Yes
>
> s/ Maxine Williams
> Foreman

Thereupon the jury was directed by the Court and did return the following general verdict:

> "We, the Jury, find for the Defendants. This 3rd day of April, 1972.
>
> s/ Maxine Williams
> Foreman

In accordance with the verdict of the jury, the District Court entered judgment against Respondents, Plaintiffs in the District Court, and in favor of Petitioners, Defendants in the District Court. On Respondents' appeal from the District Court's judgment, the Court of Appeals for the Fifth Circuit reversed and remanded the case with directions to enter judgment in Respondents' favor against Petitioners, holding that "waiver" is not a defense under any circumstances to civil liability under the Securities Act of 1933.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit should be reviewed by this Court on Writ of Certiorari because:

(1) it has erroneously decided an important question of Federal Law which has not been, but should be, settled by this court; and

(2) the decision is in conflict with the decision of another Court of Appeals on the same matter.

In either event, this Court should grant review and decide the question presented in this case.

1. The Court of Appeals for the Fifth Circuit has erroneously held, in this case, that a purchaser of securities sold in violation of Section 5, Securities Act of 1933, 15 U.S.C. §77e, cannot effectively waive his rights under Section 12(1), even after full knowledge of the violation, rights and remedies and after the occurrence of the controversy. The Court of Appeals bases this holding upon Section 14 of the Act. While this Court has previously held the waiver of a future controversy arising under the Securities Act of 1933 invalid, in *Wilko* v. *Swan*, 346 U.S.

427, 98 L.ed. 168 (1953), it has never decided the important question presented by this case.

The importance of the question presented is underscored by the fact that other Federal Acts in the interest of public protection contain non-waiver provisions almost identical in wording to Section 14, Securities Act of 1933. Examples of such provisions may be found in the Securities Exchange Act of 1934,[1] the Public Utility Holding Company Act of 1935,[2] the Investment Company Act of 1940,[3] the Investment Advisers Act of 1940,[4] and the Interstate Land Sale Full Disclosure Act of 1970.[5] In addition to the important effect of the question presented upon the administration of civil rights and remedies under the Securities Act of 1933, it will, in all probability, have an equally important effect upon the administration of such rights and remedies under these and any other acts for the public protection containing non-waiver provisions.[6]

The only realistic construction of Section 14 is that such section prohibits only waivers of rights or remedies under the Act that occur prior to the violation or prior to the controversy. The legal system of this nation has historically encouraged civil litigants to settle their differences outside of Court, but the decision sought to be reviewed by this application would preclude litigants' reaching a binding voluntary settlement even after the

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1. See note 8, *infra*.

2. 15 U.S.C. §79z(a).

3. 15 U.S.C. §80a-46(a).

4. 15 U.S.C. §80b-15(a).

5. 15 U.S.C. §1712.

6. "Ordinarily, the same words used in different statutes on the same subject are interpreted to have the same meaning." 50 Am. Jur., *Statutes*, §272, at 260.

controversy. If Section 14, as declared by the Court of Appeals, prohibits all types of waiver as a defense to an action under Section 12(1), then private civil litigants could never settle a Section 12(1) case. Suppose, for example, that a purchaser of Securities, sold in violation of the act, and the sellers wish to settle their dispute in a way which would require the guilty seller to pay an agreed sum to the purchaser and the purchaser to give to the seller a "release"[7] of his rights. If such persons did in fact consummate such a settlement agreement, the Court of Appeals decision in this case would permit the purchaser to, nevertheless, proceed, at any time within the Statute of Limitations, under Section 12(1) against the seller who would not be permitted to defend the action on the settlement release.

While the Securities Exchange Act of 1934 is not directly involved in this case, the language of Section 29(a)

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7. There is no material distinction between a "release" and a "waiver". *Black's Law Dictionary* (rev. 4th ed. 1968), at 1751, offers, among its variously worded definitions of "waiver", the following:

> The intentional or voluntary relinquishment of a known right . . . or such conduct as warrants an inference of the relinquishment of such right. . . . The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or the opportunity to take advantage of some defect, irregularity, or wrong. (citations omitted.)

In the same publication at page 1453 "release" is defined as:

> The relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.

Neither Section 14, Securities Act of 1933, nor Section 29(a), Securities Exchange Act of 1934 contain the word "release". However, it was recognized in *Allied Artists Pictures Corp.* v. *Giroux*, 312 F. Supp. 450 (S.D.N.Y. 1970), that a "release" was equivalent to a "condition, stipulation, or provision binding any person to waive" as used in Section 29(a), Securities Exchange Act of 1934. In that case it was held that a "release" of all liability was void as applied to liabilities on account of future violations of the Securities Exchange Act under Section 29(a) of that Act.

of that Act is almost identical to Section 14 of the Securities Act of 1933.[8] Referring to these sections of both acts, it was noted in *Moran* v. *Paine, Webber, Jackson & Curtis,* 389 F.2d 242, at 245 (3rd Cir. 1968) that "the same logic is applicable . . . to both non-waiver sections". In *Pearlstein* v. *Scudder & German,* 295 F. Supp. 1197 (S.D. N.Y. 1968), it was held that stipulations agreed to after the existence of a controversy under the Securities Exchange Act of 1934 are valid and enforceable notwithstanding Section 29(a) of that Act.

That Section 14 prohibits "anticipatory" type waivers[9] was held by this Court in *Wilko* v. *Swan,* 346 U.S. 427, 98 L.ed. 168 (1953). However, the opinion in that case, at least implicitly recognized the validity of a waiver occurring after the controversy or violation.[10] The Court stated the issue before it as:

> Whether an agreement to arbitrate a *future controversy* is a "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act which §14 declares "void".

346 U.S. at 430, 98 L.ed. at 173 (emphasis added). Mr. Justice Jackson in a separate concurring opinion expressly declared that after the controversy arose "the parties could agree on arbitration" effectively since Section 14 pro-

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8. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Securities Act of 1934, Section 29(a); 15 U.S.C. §78cc(a).

9. "Anticipatory type waivers" as used herein refers to those waivers of rights coming into existence in the future.

10. *Wilko* v. *Swan,* 346 U.S. 427, at 438, 98 L.ed. 168, at 177 (majority opinion distinguishing waivers of existing controversies from waivers in advance of controversies); *Moran* v. *Paine, Webber, Jackson & Curtis,* 389 F.2d 242, at 246 (3rd Cir. 1968); see discussion at page 12, *infra.*

hibited only the waiver of the statutory judicial remedies provided by the act by agreement made before the controversy arose.

Can-Am Petroleum Company v. *Beck*, 331 F.2d 371 (10th Cir. 1964) is an application of a modified version of the doctrine of *pari delicto* rather than a direct application of Section 14. The plaintiff had purchased unregistered securities and after doing so had urged others to do so, had worked closely with the promoter in his promotional efforts and had received additional securities for such efforts. When she brought the action against the sellers for violation of 15 U.S.C. §§77e and 771,[11] the defense that she was in *pari delicto* with the sellers was asserted. In view of the conflict between the law's policy not to afford relief to either party to an illegal contract with the effective enforcement of the Securities Act, the Court formulated what we deem to be a new and modified version of the doctrine of *pari delicto* to apply in Section 12(1), Securities Act cases. The rule as was formulated in the *Can-Am Petroleum* case is fairly and accurately stated as where both parties are guilty of acts violating the Securities Act of 1933, the law will weigh their guilt and provide the statutory relief to the purchaser if he is the less culpable. While the opinion in *Can-Am Petroleum* contains the statement that the remedial aspects of the Securities Act may not be waived and cites Section 14, and *Wilko* v. *Swan*, *supra*, in support of such statement, it clearly recognized that the plaintiff-purchaser could, by subsequent conduct, become equally as culpable and be denied the remedy under the Securities Act,[12] thereby

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11. Sections 5 and 12(1), Securities Act of 1933.

12. The guilty conduct of the purchaser was weighed against that of the seller and the court held the purchaser's conduct to be the less culpable stating, "she at no time had the degree of culpability attributed to the defendants." 331 F.2d at 373.

supporting the view that provisions of the Act may be effectively waived after the existence of the controversy.

The Fifth Circuit Court of Appeals in the instant case has stated that if the respondents had rejected an unconditional tender of the amounts due under the statute with a demand for the return of the securities, "they would have impaled themselves upon such an estoppel as recognized by the Court of Appeals for the Ninth Circuit in the cases of *Straley* v. *Universal Uranium and Milling Corporation*, 1961, 289 F.2d 370 and *Royal Air Properties, Inc.*, v. *Smith*, 1964, 312 F.2d 210". In the first place, it is clear from a review of those two Ninth Circuit opinions that such an unconditional offer and demand was not made in either case. Furthermore, the Fifth Circuit's statement in the instant case is a misconstruction of the holding in the *Straley* case since, as will be pointed out in subsequent argument, the *Straley* case holds squarely that "waiver" as well as "estoppel", after the violation, is a valid defense to a Section 12(1) case.

In any event, there is no material distinction between conduct labeled as "waiver" and conduct labeled as "estoppel" insofar as Section 14 of the Securities Act is concerned. *Black's Law Dictionary* at p. 651, citing *Woodmen of the World Life Ins. Soc.* v. *Greathouse*, 242 Ala. 532, points out that the "legal effect of waiver and estoppel is the same". The law should no more permit conduct occurring prior to the violation or prior to the controversy to constitute a defense to a Section 12(1) case, than it should permit such conduct labeled as a waiver to constitute such a defense. Section 14 prohibits defenses based upon both conduct labeled as an estoppel to assert rights arising in the future and conduct labeled as a waiver of rights arising because of future violations. It does not void either a waiver or estoppel by conduct or agreement after the occurrence of a violation or controversy.

The waivers of Section 12 rights which are justified as being valid notwithstanding Section 14, are waivers which occur after the particular controversy arises. As noted in *Moran* v. *Paine, Webber, Jackson & Curtis, supra,* at 246,

> The "differentiation" [between such waivers and anticipatory waivers] expresses itself in *Wilko* v. *Swan, supra,* at p. 438, as well as in the concurring opinion of Justice Jackson. . .

In *Reader* v. *Hirsch & Co.,* 197 F. Supp. 111 (S.D. N.Y. 1961), where an agreement to arbitrate was held to be void under Section 29(a), Securities Exchange Act of 1934, the Court was cautious to note, at page 117, that its holding

> is not intended to suggest that arbitration is not available where an existing dispute is, upon the consent of the parties, submitted to arbitration. . . . *It may be noted . . . that the arguments and considerations which preclude the validity of an agreement to arbitrate future disputes are generally inapplicable to an agreement to arbitrate existing disputes.* . . . (emphasis added).

As noted in *Pearlstein* v. *Scudder & German, supra,* at p. 1203, "section 29(a) [Securities Exchange Act of 1934] has been judicially construed to preclude *only* those waivers of Securities Exchange Act provisions . . . made prior to the existence of a controversy".

2. The decision sought to be reviewed by this petition is in direct contradiction to *Straley* v. *Universal Uranium & Milling Corp.,* 289 F.2d 370, decided by the Court of Appeals for the Ninth Circuit in 1961. *Straley* remains to this day binding authority in the Ninth Circuit for the rule that a securities purchaser's conduct subsequent to a violation of Section 5, Securities Act of 1933, may

validly waive such purchaser's rights under Section 12(1). While the Court in *Straley* stated the question before it as being

> May laches bar the recovery by the purchaser of the consideration paid for securities issued in violation of Title 15 U.S.C.A. §77e, where the purchaser proves his claim under Title 15 U.S.C.A. §77(1), and has brought his action within one year from the date of the sale of such securities as required by Title 15 U.S.C.A. §77m?

it was also necessary for the Court to decide whether the defenses of estoppel or waiver were valid in such an action. In holding that the equitable defense of laches was not available in a Section 12(1) case but that both waiver and estoppel were each available and valid defenses the Court of Appeals remanded the case to the District Court with instructions to consider and rule upon each of those defenses as applied to the evidence.

Following the holding in the *Straley* case, the same Court declared that waiver and estoppel subsequent to the violation were both valid defenses to a civil action based upon Section 10b-5, Securities Exchange Act of 1934, and Rule 10b-5 of the Securities Exchange Commission in *Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210 (9th Cir. 1962). The opinion of the Court in *Royal Air* expressly supports Petitioners' contention that *Straley* v. *Universal Uranium & Milling Corp., supra*, held squarely that waiver is an available defense to a Section 12(1), Securities Act case.[13] *Royal Air* cannot be distinguished from the instant case because it arose under Section 10b, Securities Exchange Act, while the instant case arises under Section

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13. If *Straley* had held that waiver and estoppel were not available defenses, the court "would not have remanded the case to permit their presentation. . ." *Royal Air Properties* v. *Smith*, 312 F.2d at 213.

12, Securities Act. As noted in previous discussion, both acts contain almost identical nonwaiver provisions. As noted in *Royal Air*, the Securities Exchange Act is in no way designed to afford a remedy to an investor who loses his innocence and chooses to wait and see how his investment turns out.

Petitioners submit that the Securities Act like the Securities Exchange Act, is in no way intended to afford such a securities purchaser with a "guaranteed or your money back with interest" "no-risk" investment opportunity. But the decision sought to be reviewed hereby does, in fact, create such an opportunity, despite the Court's denial of this effect.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit in order that this case be reviewed by this Court for the reasons that:

1. The Court of Appeals has decided an important question of Federal law not previously decided by this Court and has under, *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210 (9th Cir. 1964); *Straley* v. *Universal Uranium and Milling Corp.*, 289 F.2d 370 (9th Cir. 1961); and *Pearlstein* v. *Scudder & German*, 295 F. Supp. 1197 (D.C. N.Y. 1968), decided such question erroneously; and

2. The decision of the Court of Appeals for the Fifth Circuit is in direct conflict with *Straley* v. *Universal Uranium and Milling Corp.*, 289 F.2d 370 (9th Cir. 1961), decided by the Court of Appeals for the Ninth Circuit.

.....

JOHN B. MILLER

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2632

D. C. Docket Nos. CA 492, 493 & 499

JOHN C. MEYERS & LUCY B. MEYERS, ET AL,
Plaintiffs-Appellants,

versus

C & M PETROLEUM PRODUCERS, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

Before COLEMAN, MORGAN and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

April 10, 1973

RONEY, Circuit Judge, specially concurring:

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2632

JOHN C. MEYERS & LUCY B. MEYERS, ET AL,
Plaintiffs-Appellants,

versus

C & M PETROLEUM PRODUCERS, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion April 10, 1973, 5 Cir., 1973, ... F.2d .....).

(May 24, 1973)

Before COLEMAN, MORGAN and RONEY,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2632

JOHN C. MEYERS & LUCY B. MEYERS, ET AL,
Plaintiffs-Appellants,

versus

C & M PETROLEUM PRODUCERS, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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(April 10, 1973)

Before COLEMAN, MORGAN and RONEY,
Circuit Judges.

COLEMAN, Circuit Judge: Section 77l, Title 15, United States Code provides as follows:

§77l. Civil liabilities arising in connection with prospectuses and communications.

Any person who—

(1) offers or sells a security in violation of section 77e of this title,

* * * * * * *

> shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

In this appeal the sole issue is whether, under the pleadings and the facts, plaintiffs-appellants waived the right of recovery provided by the above statute.

The District Court submitted the issue to a jury, which found for the defendants, with judgment accordingly. We reverse and remand, with directions that judgment be entered for plaintiffs for the recovery specified by §771.

C & M Petroleum Producers, Inc., is a Georgia corporation with its principal office and place of business in Jessup, Georgia. The corporation was organized for the purpose of buying and selling mineral leases in gas and oil wells in Ohio. The Company began to offer to sell and deliver these securities to certain residents of Georgia and Florida. The purchasers-appellants paid C & M a total of $23,750 for their interests in the wells. Although no registration statement has been filed with the Securities and Exchange Commission as required by §5 of the Securities Act of 1933, the mails, telephone, and other means of interstate transportation and communication were employed by C & M in these offers, sales, and deliveries.

Being informed of non-compliance with the registration requirements of the Securities Act of 1933 and the Georgia Securities Act of 1957, C & M wrote purchasers-appellants on May 27, 1969, advising them of the status of the matter and offering to repurchase their interests in the wells. The letter stated:

"We are advised that as a result of having sold you an interest in the above mentioned gas wells, we are in violation of the Georgia Securities Act of 1957 as amended and the Securities Act of 1933 as amended. These Statutes provide that we should have registered this interest as a security before offering it to you for sale. Consequently, in view of our violation of the Georgia and Federal Statutes, we hereby offer to repurchase from you said interest for the sum of money paid by you for said interest, less any monies received by you therefrom. This offer to repurchase the above described interest from you shall terminate ten days after the date hereof. In other words, you have ten days to decide whether you want to keep your interest or not. Enclosed is a copy of this letter on which you are requested to indicate your preference. You will also find herewith a stamped, self-addressed envelope in order that you may return the enclosed copy to us promptly. Very truly yours, C & M Petroleum Producers, Incorporated. Herman Morris.

"1. I desire that my interest be repurchased ( ).

"2. I do not desire that my interest be repurchased ( ).

"If we have not received a reply within ten days, we will assume that you wish to keep your interest in the referred well or wells."

The purchasers did not accept this proposal. Their attorney wrote C & M that he felt it impossible to determine the feasibility of accepting or rejecting the purchase offer unless first given data which would reflect the actual value of the securities. This clearly meant that the

purchasers did not wish to surrender the securities if they were worth more than had been paid for them. The letter raised no other impediment to the return of the stock. It indicated an unwillingness to accept the remedy provided by the statute.

The purchasers took no further action and the ten day period expired. C & M then revoked the offer to repurchase.

Thereafter, the purchasers received and accepted $1,472.91 in income from the wells.

On December 23, 1969, the purchasers brought suit to recover the consideration paid for the securities, with interest, less the income received therefrom.

As already stated, the District Court allowed into evidence C & M's ten day repurchase offer as bearing on whether the purchasers had waived their rights under §5 and 12(1) of the Securities Act of 1933 [15 U.S.C., §77e and 77l]. The jury found that the purchasers-appellants had waived their rights and judgment was entered for C & M.

Appellants assert two grounds for reversal: that the defense of waiver is not available in a suit arising under §12(1) of the Act, and that the repurchase offer itself violated the registration requirements of the Act.

Since, except for the self-imposed ten day limitation, the C & M letter was an offer to provide the remedy prescribed by statute, we find no merit in the second argument.

This leaves remaining only the contention that by the express provisions of the Securities Act mere waiver was not, and could not be, a defense to this suit.

We recognize, of course, that ordinarily one may waive constitutionally guaranteed rights if it is intentionally and voluntarily done, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

As to the sale of unregistered securities, however, Congress has specifically placed waivers in a different context. 15 U.S.C., §77n, provides that:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Can-Am Petroleum v. Beck, 10 Cir., 1964, 331 F.2d 331, was a case in which undivided interests in oil and gas leases had been sold in violation of §77e and 77l of the Act. The Court held that the remedial aspects of the Securities Act cannot be waived, either directly or indirectly, citing *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). The appellees here, defendants in the court below, sought to establish a waiver in the manner and form already set forth. Contrary to the general rule applicable to other transactions, this has been expressly prohibited by the Congress for the purpose of making the Act as effective as possible.

If C & M had unconditionally tendered the refund of the purchase price together with interest, less income received from the securities, coupled with a demand for the return of the securities, and had the purchasers rejected such an unconditional tender and demand they would have impaled themselves upon such an estoppel as recognized by the Court of Appeals for the Ninth Circuit in the cases of *Straley v. Universal Uranium and Milling Corporation*, 1961, 289 F.2d 370, and *Royal Air Properties, Inc. v. Smith*, 1964, 312 F.2d 210. What the appellees did was to make an *offer* to repay the purchase price and accept

return of the securities, but they imposed their own ten day limitation upon the acceptance of the offer. When the offer was not accepted within the prescribed time the sellers cancelled it, restoring the parties to the position they occupied before the offer was made. While, as the jury found, this could be enough to establish a waiver, it was not enough to create an estoppel, lacking, as it did, an unconditional tender and demand.

Our opinion in this case is not to be construed as holding that purchasers of unregistered securities may reject the remedy provided by law when unconditionally tendered and thereafter, at their option, dally around while interest is running and increment is occurring, only to bring suit, at their pleasure, sometime within the statutory period. Such a course is on its face a distortion of the remedy provided by Congress.

Neither is this opinion to be construed as holding that once a purchaser receives such an unconditional tender and demand he may take the attitude of accepting it only if it is to his pecuniary advantage to do so. Without cavil, he must accept or reject. He cannot eat the cake and keep it, too.

Our holding in this case is that while the defendants-appellees established a waiver, the statute permits none.

For these reasons, the judgment of the District Court must be reversed and the cause remanded, with directions as hereinabove set forth.

REVERSED and REMANDED, with DIRECTIONS.

RONEY, Circuit Judge, specially concurring:

I concur in the decision that the failure of the purchasers to accept the repurchase offer of the sellers did not constitute an effective waiver of rights under the statute. The matter is completely within the control of Congress, which provided that

> *Any* condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be *void.* (Italics added)

Section 14, Securities Act of 1933, 15 U.S.C.A. §77n. Since apparently an intentional, formal, written waiver executed either before or after the acquisition of securities is void, *a fortiori* any waiver that might be inferred from less formal acts must also be void.

Although I understand the other comments in the opinion to be only an explanation of the holding, I would not pass on the possibility of an estoppel until confronted with a case to which that doctrine might be applicable.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1973

No. 72-1658

C & M PETROLEUM PRODUCERS, INC.; HERMAN MORRIS; DAVE MADRAY; AND HERSHELL COLLINS,
Petitioners,

vs.

JOHN C. MEYERS and LUCY B. MEYERS; JOHNNY DEAL; BILLY G. TILLMAN; H. LEHMAN FRANKLIN, JR.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

During 1968, the Petitioners (hereinafter "Sellers") began offering for sale in interstate commerce, working interests in oil wells located in Ohio. These securities were so offered and sold in violation of section 5 of the Securities Act of 1933 since no regis-

tration statement as required by that statute had been filed at the time of offer and sale. The securities were also sold in violation of the Georgia Securities Act of 1957.

Once the Sellers were informed of the violations of the Securities Act of 1933 and the Georgia Securities Act of 1957 due to the unregistered status of the securities, they wrote to the Respondents (hereinafter "Purchasers") on May 27, 1969 advising them of the violation of the federal and state statutes and offering to repurchase their interests in the wells. The letter stated that unless reply was received within ten days, it would be assumed that the offer was rejected. The full text of the letter is quoted in the opinion of the Court of Appeals. On May 30, 1969, Lehman Franklin, Jr., one of the purchasers and attorney for the other purchasers, wrote a letter to Herman Morris, officer and agent of C & M Petroleum, stating the impossibility of accepting or rejecting the repurchase offer at that time and requesting certain investment information concerning the securities. The information sought was such that would have been normally revealed in a registration statement and prospectus had such accompanied either the original offering of the securities or the rescission letters.

Failing to receive the information requested, the Purchasers were unable to make an intelligent evaluation of the matter or an informed decision, particularly within the arbitrary ten day time limit imposed by the Sellers. The absence of the information requested also prevented the Sellers from evaluating the exaggerated press accounts and promotional literature concerning the securities at the time the rescis-

sion offers were made.

Not knowing the true value of their securities, the Purchasers made no decision in response to the rescission letters other than to request further information. When the information was not forthcoming and the rescission offers were subsequently withdrawn, the Purchasers commenced their actions in the United States District Court for the Southern District of Georgia.

The District Court submitted the case to the jury on the question as to whether or not the Purchasers had waived the right to the return of their money. After an affirmative finding by the jury, the Purchasers appealed to the Circuit Court which reversed and remanded the case with directions for judgment to enter in favor of the Purchasers holding that waiver is not a defense under the Securities Act of 1933.

QUESTION PRESENTED

The question presented in this case is whether a purchaser of securities sold in violation of section 5 of the Securities Act of 1933, may, within the applicable statute of limitations, but before the commencement of litigation, effectively waive his rights to obtain a return of his investment by failing to accept a rescission offer within an arbitrary period of ten days.

ARGUMENT

A. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN HARMONY WITH EXISTING FEDERAL LAW.

The Court of Appeals held that section 14 of the Securities Act of 1933, 15 U.S.C. §77(n), prohibits a waiver of a purchaser's rights to recoup his investment if unregistered securities are sold to him. By so holding, the Court of Appeals not only reaffirmed its previous pronouncements upon the subject of waiver under the 1933 Act, but it also followed the established federal law on the subject.

In **Wilko v. Swan,**[1] the Supreme Court invoked the nonwaiver provisions of section 14 of the 1933 Act to invalidate a customer's margin agreement binding him to arbitration in the event of a controversy with a securities firm. Illustrative of the different "rules" applicable to the purchasers of securities is the following commentary by the Court on section 14 of the Act:

> ". . . We think the right to select the judicial forum is the kind of "provision" that cannot be waived under §14 of the Securities Act. . . . While a buyer and seller of securities under some circumstances may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by the Act on a different

[1] 346 U.S. 427, 98 L ed 168 (1953)

basis from other purchasers.

> When the security buyer, prior to any violation of the Securities Acts, waives his rights to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."[2]

The Securities Act of 1933, both in its affirmative requirements of registration and prohibitions against a waiver of compliance, has been tightly and literally construed by the courts. Section 12 of the Act has been held to provide virtually absolute liability, the only defense to which being allegation and proof by the defendant that the particular security or transaction was exempt from the provisions of section 5[3]. The foregoing holding by the District Court for the Western District of Louisiana was expressly approved by the Fifth Circuit Court of Appeals in a per curiam opinion.[4]

Not only is the holding by the Fifth Circuit in the present case in harmony with the previous decisions of the Supreme Court and the Fifth Circuit, but it is likewise in harmony with the overwhelming weight of authority on this question.

The opinion of the Fifth Circuit follows the holding of the Tenth Circuit in **Can-Am Petroleum Company v. Beck**[5], wherein it was held that the remedial

[2] 346 U.S. at 435, 98 L ed at 175
[3] Lynn v. Caraway, 252 F.Supp. 858 (W.D. La. 1966)
[4] Lynn v. Caraway, 379 F.2d 943 (5th Cir. 1967)
[5] 331 F.2d 371 (10th Cir. 1964)

aspects of the Securities Act could not be waived, directly or indirectly. In **Can-Am,** as in the instant case, undivided interests in oil wells were offered and sold without registration. One purchaser, Mrs. Beck, became involved in promotional efforts to others and when she filed suit to obtain a return of her investment the sellers contended that she was prevented from doing so because she was **in pari delicto** with them. In rejecting such a defense, the Tenth Circuit held that an investor does not lose the shelter of the Act because he becomes to some extent involved in the illegality of the security sales, citing as its reason "the public interest in the enforcement of the Securities Act" which "outweighs any equitable barriers to recovery by a purchaser of unregistered securities".

The Fifth Circuit has reaffirmed the rejection of equitable defenses in its recent decision, **Henderson v. Hayden, Stone, Inc.**[6] There the seller of unregistered securities attempted to defeat recovery by asserting an estoppel arising from the investor's expertise and sophistication as a trader. In rejecting such a defense, the court recognized the investors lack of innocence but held:

> "Congress sought to encourage sellers of securities to register those securities prior to any sales or offers to sell. By allowing recoveries such as the one in this case, unregistered sales are discouraged."

The foregoing philosophy underlying the 1933 Act has also been enunciated by the United States Court of Appeals for the Second Circuit. In **Kaiser-Frazer Corp. v. Otis & Co.,**[7] the court considered a situation

[6] 461 F.2d 1069 (5th Cir. 1972)
[7] 195 F.2d 838 (2d Cir. 1952)

where Kaiser-Frazer sought damages from an underwriter who, at the eleventh hour, refused consummation of an underwriting agreement citing misrepresentations in the prospectus as to earnings and an error in the opinion of counsel as to pending litigation. Kaiser-Frazer countered that the underwriter was estopped or had waived such a defense because it had full knowledge of all the facts, not only at the time of the underwriting agreement, but also as a result of independent investigations, and could not rely upon such facts as constituting a breach of warranty. The Second Circuit permitted no recovery on the contract because of its illegal nature and stated:

> "But whatever the rules of estoppel or waiver may be in the case of an ordinary contract of sale, nevertheless it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws, is unenforceable . . . This is so regardless of the equities as between the parties for the very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone."

The Sellers contend that two decisions of the Ninth Circuit, **Straley** v. **Universal Uranium and Milling Corporation,**[8] and **Royal Air Properties, Inc.** v. **Smith,**[9] are contrary to the decision of the Fifth Circuit. **Royal Air** differs factually from the instant case as it was based upon a violation of section 10(b) of the Securities Exchange Act of 1934 and Rule X-10 (b)-5 of the Securities & Exchange Commission for misrepresentation in the sale of stock. In that case, where no overriding policy consideration such as the

[8] 289 F.2d 370 (9th Cir. 1961)
[9] 312 F.2d 210 (9th Cir. 1964)

nonregistration of securities was involved, but rather only a misrepresentation as between the parties, the court allowed consideration of the defense of waiver but held that the facts did not support a waiver. In **Straley,** stock was purchased in a Nevada uranium mining venture in November of 1955. In January 1956, the purchasers became aware that the stock had been sold in violation of the Securities Act. In March, and again in May, the purchasers voted for a merger and in July, and again in October, they exchanged their shares for stock in the successor corporation. In November 1956, the value of the securities drastically dropped. On November 20, 1956, one day before the statute of limitations expired, suit was commenced. The District Court concluded that recovery was prevented by the equitable doctrine of laches. The Ninth Circuit reversed, holding that the equitable defense of laches was unavailable as a bar to recovery under the Securities Act. Subsequently, the Ninth Circuit opinion discusses the **possible** application of waiver and estoppel as a defense but this discussion is purely **obiter dictum,** not essential to or involved with the decision and therefore not binding authority, as the sellers claim, that purchasers' rights under section 12(1) may be waived.

The imposition of absolute liability for a violation of section 5 has earned wide acceptance by noted commentators and has enjoyed increasing judicial approval. Professors Jennings and Marsh are counted among the adherents to the absolute liability position.

> "§12(1) of the Securities Act of 1933 imposes civil liability for sale of a security in violation of §5 of the Act. The liability is absolute, there being no defense except to show that the sale was not

in violation of §5. Even if a prospectus were prepared truthfully containing all of the information required by the Act and were delivered to the vendee, this fact would be totally immaterial in an action under §12(1), unless it were part of an effective registration statement. Thus §12(1) gives the vendee of a security sold in violation of §5 an unqualified 'put' of the security back to the vendor within the period of the statute of limitations at the purchase price." Jennings and Marsh, **Securities Regulation, Cases and Materials,** 813 (2d. ed. 1968).

And, as Professor Loss has observed in his respected treatise,

> "Liability under §12(1) is virtually absolute. The plaintiff need only allege and prove (1) that the defendant was a seller, or under §15, a person in control of a seller; (2) that the mails or some means of transportation or communication in interstate commerce was used, not just in connection with the offering of the security generally but in the offer or sale to the particular plaintiff; (3) that the defendant failed to comply with either the registration or the prospectus requirement; (4) that the action is not barred by the statute of limitations; and (5) that adequate tender was made when the plaintiff is seeking rescission.
>
> The only defense then available to the defendant is to allege and prove that the particular security or transaction was exempt from §5." 3 Loss, **Securities Regulation,** 1693 (2d. ed. 1961).

An exemption from the section 5 requirements was found to be the only defense to an action for the return of an investment in oil and gas leases in **Repass v. Rees**[10] where the court concluded that the defend-

[10]174 F. Supp. 898 (D. Colo. 1959)

ants committed a violation of the Securities Act of 1933, and that their liability under section 12 of the Act was absolute, no exemption from the registration requirements having been proved.

The doctrine of absolute liability has also been accepted by the Tenth Circuit. That court, in **Woodward v. Wright,** [11] found the congressional purpose to require a registration statement with the offer or sale of securities to the general public and the imposition of absolute liability for failure to register nonexempt transactions.

B. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT REFLECTS THE CORRECT APPLICATION OF §14 OF THE SECURITIES ACT OF 1933.

The Sellers argue that certiorari should be granted because section 14 of the Act only prohibits an "anticipatory" type waiver and furthermore that a prohibition of all waivers would prevent civil litigants from effecting a settlement of a section 12(1) case.

The instant case does not involve an "anticipatory" agreement to waive rights such as a court hearing, rather, the Sellers of the securities seek to imply a waiver of the benefits of the Act from the events surrounding the rescission offers. Assuming **arguendo** the distinction between an agreement to waive a future controversy ("anticipatory") as opposed to a matured controversy, it is clear from the facts that the controversy had not in fact matured at the time

[11] 226 F.2d 108 (10th Cir. 1959)

the events claimed to be a waiver took place. The Purchasers had not instituted suit nor had they demanded payment. The Sellers did not alert the Purchasers that the right of rescission should be accepted within the arbitrarily imposed ten day limit failing which the right would be waived. The parties had not assumed adversary positions.

The Securities Act of 1933 does not prevent the settlement of litigation. It does, however, prohibit the unintentional or involuntary relinquishment of the right of reimbursement.

The Sellers cite the case of **Pearlstein** v. **Scudder & German,** 295 F.Supp. 1197 (S.D. N.Y. 1968), as authority for the proposition that "stipulations agreed to after the existence of a controversy under the Securities Exchange Act of 1934 are valid and enforceable notwithstanding §29(a) of that Act".[12] The foregoing decision is not such authority because it has been reversed by the Second Circuit.[13] **Pearlstein** involved a violation of the 1934 Act rather than the 1933 Act (the violation of margin requirements and Regulation T of the Federal Reserve System relating to timely payment for purchases). In the decision which the Sellers cite, the lower court had held that certain stipulations of settlement in a state court action barred the action under consideration which resulted from a violation of the Federal Act. In reversing the lower court and declaring void such a purported waiver, the Second Circuit again recognized the following overriding policy considerations which prohibit waivers:

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[12]page 9 of petition

[13]**Pearlstein** v. **Scudder & German,** 429 F.2d 1136 (2d Cir. 1970); cert. denied 401 U.S. 1013, 28 L ed 2d 550.

a. The value of the private action to the enforcement of the securities laws ("in our view, the danger of permitting a windfall to an unscrupulous investor is outweighed by the salutary policing effect which the threat of private suits for compensatory damages can have upon brokers and dealers above and beyond the threats of governmental action by the Securities & Exchange Commission")[14].

b. The value of encouraging private actions to force sellers or brokers to shoulder the responsibility Congress has placed upon them.

c. The allowance of waivers would serve only to legalize the actions which private suits serve to discipline.

In commenting upon section 29(a) of the 1934 Act, the Court stated:

> "Section 29(a) of the Securities Exchange Act holds void any stipulation obligating a party to waive compliance with the Act. Although the lower court held that waivers of rights under the Act may be given effect if the waivers occur after the commencement of suit, the cases cited only stand for the proposition that the remedial right of access to the courts after an act of controversy has arisen can be waived knowingly in favor of arbitration. Here it is difficult to say that Pearlstein's waiver was knowing given the apparent lack of inducement to give up his rights other than financial pressure. But if the waiver were knowing, it would not secure some desirable end such as arbitration easily compatible with the broad purpose of the Act but would instead only

[14] 429 F.2d at 1141

serve to legalize the very extension of credit which the margin requirements seek to prevent and which suits such as this one serve to discipline." (emphasis supplied).

Thus it is clear from the authorities cited by the Sellers that even under the 1934 Act, a purported waiver, which must occur after commencement of suit, is effective only in favor of arbitration, and is ineffective and void where the end accomplished thereby would serve only to legalize a violation of the Act.

In the instant case there has been no express waiver of rights nor an agreement to arbitrate, only a request by the Purchasers for information with which to evaluate the proffered rescission. A waiver under such circumstances is not only incompatible with the broad purposes of the Act but, to the contrary, serves only to legalize the sale of nonregistered securities. If rights can be so easily extinguished then no seller of securities would feel obligated to register, safe in the knowledge that he could protect himself from civil liability by simply offering a rescission once a violation became discovered, all the while withholding the information required by the Act and necessary for an intelligent decision by the public both upon the merits of the investment or the rescission offer. Indeed such a result would thwart the public policy commanding the registration of securities.

The Supreme Court has indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes. In **Perma Life Mufflers Inc. v. International**

Parts Corp.[15] The court rejected the equitable defense of **in pari delicto** to a treble damage action brought by a plaintiff under the antitrust statutes.[16]

The reasoning of the Supreme Court has been applied to a securities case in **Nathanson v. Weis, Voisin & Cannon, Inc.**[17] in which the United States District Court for the Southern District of New York concluded that the defense of **in pari delicto** to a securities case must yield to the overriding policy considerations in order to secure effective enforcement of the antifraud provisions of the Securities Acts.

CONCLUSION

Therefore, the Fifth Circuit was correct in holding a waiver of benefits unavailable under section 14 of the 1933 Act. That decision reflects the recognition that the right of private actions be scrupulously preserved against relinquishment. Otherwise, the interest which both individuals and the community at large have in the effective enforcement of the regulations of securities markets will be undermined. In so holding, the Fifth Circuit was both correct and in harmony with the authorities and the trend of federal law. For these reasons, it is respectfully urged that the Su-

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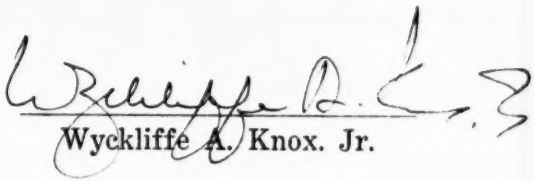
[15] 392 U.S. 134, 20 L ed 2d 982, 88 S.Ct. 1981

[16] "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement and permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain subject to civil and criminal penalties for their own illegal conduct . . ."

[17] 325 F.Supp. 50 (S.D. N.Y. 1971)

preme Court should not issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.



Wyckliffe A. Knox. Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel of record for the petitioners, John B. Miller, Post Office Box 8426, Savannah, Georgia 31402 with three copies of the within and foregoing brief by mail by depositing same in the United States Post Office or mail box with first class postage prepaid, addressed as above indicated.

This 6th day of July, 1973.

Wyckliffe A. Knox. Jr.